SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 198

ROBERT R. COX,
PETITIONER,

vs.

GUY T. HELVERING,
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

No. 199

ETHEL K. CHILDERS,
PETITIONER,

vs.

GUY T. HELVERING,
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

REPLY BRIEF OF PETITIONERS.

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The petitioners beg leave to suggest in reply to brief for the respondent that the case of *Fulham v. Commissioner*, 110 Fed. (2) 916, decided by the same Court which decided *Higgins v. White*, 93 Fed. (2d) 357, does not overrule *Higgins v. White*, nor is it applicable to the case at

bar. The Fulham case goes to the question of whether the beneficiary had a substantial adverse interest. That question is not raised, in the cases at bar, and it was not decided by the court below.

In the Fulham case, the wife, Mrs. Fulham, was held not to have a substantial interest. The grantor, the husband of Mrs. Fulham, conveyed certain property to himself and another as co-trustee, the instrument providing:

> "Until the death of my wife, Mary E. Fulham, the trustees shall accumulate the income of the trust fund. During my wife's life the trustees may pay to her at any time or from time to time any part or parts or the whole of the principal and all accumulated income of the trust fund."

Other clauses contained detailed provisions, operative upon the death of Mrs. Fulham, for the payment of the income, and eventually the principal, to the children of the grantor or their issue; set up a Committee of three named persons having no interest in the trust, any two of whom could change, alter or revoke any or all provisions of the trust instrument, and could declare new trusts in any way or manner. By the Committee's own amendment they could not, while Mrs. Fulham was living and competent to act, revest in the grantor title to the corpus or income without the consent of Mrs. Fulham. This was the only restriction on them. Mrs. Fulham's only interest in the trust was the possibility of receiving principal or income under the above quoted clause. No payments under said clause had ever been made to her.

The immediate question, therefore, was whether Mrs. Fulham had a "substantial adverse interest". The Court held that Mrs. Fulham did not have a "substantial adverse interest" because there was no criterion laid down for the guidance of the trustees by which payments of the income or principal could be made to her, and because the Committee, which had no adverse interest, could amend the trust to wipe out her interest. The Court distinguished the case from Higgins v. White and similar cases in the following language:

> "True, it is provided that the trustees 'may' make payments to Mrs. Fulham. *** But no criterion is laid down for the guidance of the trustees, as in Corkey v. Dorsey, 232 Mass. 97, 111 N. E. 795 (1916), relied on by petitioner, where the trustee was empowered to make payment to a designated beneficiary when in the judgment of the trustee, the beneficiary 'is deserving and in need of aid' in such sum as the trustee 'may deem expedient or necessary' for the best interest of the beneficiary. *** It does not appear in the record that Mrs. Fulham has in fact been receiving any payments."
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> * * * * *
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> "The insubstantial character of Mrs. Fulham's interest in the corpus of the trust is further evident from the fact that the committee could at any time by further amendment of the trust instrument destroy her interest, whatever it is, by taking away from the trustees the power to make payments to her. No such feature was present in Corning v. Commissioner, 104 Fed. (2d) 329. Moreover, that case *** is not a contrary authority, for there, the person having the veto power over revesting the corpus in the grantor had a more substantial interest than Mrs. Fulham, here, and according to the court 'in any event

> would receive the corpus if he survived the petitioner the grantor.' *** Our decision in Higgins v. White, 93 Fed. (2d) 357, is not now relevant because in that case the power which the trustees vested in the grantor and his co-trustee to revest the corpus in the grantor if 'the trustees shall deem it wise so to do', was held to be a fiduciary power subject to the control of a court of equity, and not an absolute and unconditional power vested in the grantor either alone or in conjunction with the other trustees."

The Court further referred to *Dumaine v. Dumaine,* 16 N. E. (2) 625 (Mass. 1938). That case involved the construction of a provision in a trust instrument that the trustee:

> "shall have full power and discretion to determine whether any money or other property received by him is principal or income without being answerable to any persons for the manner in which he shall exercise that discretion."

The Court there held that the trustee did not have uncontrolled discretion, and said:

> "This court has uniformly held that trustees in whom a discretion is vested are under an obligation to exercise a 'sound judgment and a reasonable and prudent discretion.' (citations) 'That kind of power and discretion which inheres in a fiduciary relation and not that illimitable potentiality which an unrestrained individual possesses respecting his own property.' (citations) 'Soundness of judgment which follows some due appreciation of trust responsibility.' "

In the instant case, there is a criterion laid down for the guidance of the trustees, in language very similar to

that in Higgins v. White. It is contained in Paragraph Second (d) (T. 39) of the trust agreement (Childers).

In the case at bar, there is no such committee as in the Fulham case, and no power to revoke or revest or to consent to the same is placed in any specific person. It is expressly provided in Paragraph Sixth of each instrument (T. 21, 46) that the trust agreement may be altered, amended or revoked by the donor only in conjunction with any other beneficiary then *sui juris* and *having a substantial adverse interest* in the corpus or the income therefrom. If a son, daughter, sister, brother or any other beneficiary who attempts to join in altering, amending or revoking the instrument do not have a substantial adverse interest, then that beneficiary does not have the power to join in such act and the act would be a nullity. If it be contended by Respondent that a son, being dependent upon a grantor, or a wife, being a member of his immediate family, is by that very reason incapable of having a substantial adverse interest, petitioner respectfully submits that such is not the law nor was it in contemplation of Congress in passing the statutes under construction here. But even if such were the law, then under the terms of the trust instruments such beneficiaries could not join in an alteration, amendment or revocation. To argue that any of the beneficiaries in these trusts does not have a substantial adverse interest, is to argue that the beneficiary's power to join in altering, amending or revoking is nullified. In the Fulham case, power to join in a revocation was vested in

Mary E. Fulham, irrespective of whether she had or had not a substantial adverse interest. There is no such provision in the trusts at bar.

In the Fulham case, the Court said that on the face of the instrument, the main objective seemed to be to accumulate the income during the life of Mrs. Fulham for the benefit of the children. The primary direction to the trustees under the instrument, was to accumulate the income. In the instant case, the instrument shows that the main objective of the trust was to pay the entire corpus and 9/10 of the income to beneficiaries other than donor; and the primary direction to the trustees, under the instrument, was to pay out and distribute to the beneficiaries all of the income, currently. Only in the event that the trustees, in their discretion, considered it for the best interests of the beneficiaries, was the income to be accumulated instead of being distributed all at once, and then was to be conserved only for the purpose of future distribution to the respective beneficiaries. The beneficiaries, other than donor, eventually will receive all of their accumulated income and all of the corpus.

The record (T. 12, 35) shows that substantial distribution of income has been made in the cases at bar each year. In the Cox case there has been virtually no accumulation. In the Fulham case, no distribution whatever was made to Mrs. Fulham.

We, therefore, respectfully submit that the Fulham case should not operate to prevent the granting of the Writs of Certiorari herein.

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